

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSE I.,)	2 CA-JV 2012-0010
)	DEPARTMENT A
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
JOSE M. and FAITH I.-M.,)	Appellate Procedure
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J19781700

Honorable Gus Aragón, Judge

AFFIRMED

Nuccio & Shirly, P.C.

By Jeanne Shirly

Tucson
Attorneys for Appellant

Pima County Office of Children's Counsel

By Jillian F. Aja

Tucson
Attorneys for Appellees

B R A M M E R, Judge.

¶1 Jose I., father of Jose M. and Faith I.-M., appeals from the juvenile court's order adjudicating the children dependent pursuant to A.R.S. § 8-201(13). Jose I. challenges the sufficiency of the evidence to support the court's ruling. We affirm.

¶2 On appeal from a dependency adjudication, we view the evidence “in the light most favorable to sustaining” the juvenile court’s order. *Willie G. v. Ariz. Dep’t of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005). In February 2011, Blanca M., the children’s mother, took fifteen-month-old Jose M. and six-month-old Faith to the hospital, where both tested positive for *Escherichia coli* bacteria. Jose M. recovered after three to four days in the hospital and was released to Jose I.’s care. Faith’s condition grew worse; she developed multiple bacterial infections while in the hospital. Ultimately, medical personnel concluded Faith’s continuing illness was most likely caused by Munchausen by proxy, that is, Blanca was making the child ill for personal gain and it was believed she was injecting material into the child’s intravenous line while she was in the hospital. Blanca was charged with attempted first-degree murder and child abuse. Child Protective Services (CPS) took custody of the children and placed them with Jose.

¶3 The Arizona Department of Economic Security (ADES) filed a dependency petition in April 2011, alleging the children were dependent as to both parents. With respect to Jose I., ADES alleged the children were dependent because he was not married to Blanca and lacked a custody order, had not been involved with the children or their medical case, and he had failed to protect the children from their mother. Jose M. was placed with Jose I., who was living with his mother; Faith remained in the hospital but was placed with Jose I. when she was released. Jose I. filed a paternity action, establishing paternity, which the court consolidated with the dependency petition.

During a mediation session in July 2011, custody and parenting time agreements were drafted.

¶4 At a hearing on July 14, 2011, ADES informed the juvenile court that as soon as a custodial agreement was signed, ADES would move to dismiss the dependency petition. But counsel for the children stated she was concerned about certain portions of Dr. Carlos Vega’s psychological evaluation of Jose I. The court directed the parties to attempt to resolve the issues through settlement. Later that day, a Custody and Parenting Time Agreement, Approval Statement and Conditions of Parenting Time, and Parental Access Order were signed by the court. ADES then orally moved to dismiss the dependency petition. After a hearing in August, the court denied the motion to dismiss the dependency petition and set the case for contested dependency hearings beginning in October. After hearings over six days between October 4, 2011, and January 20, 2012, the court adjudicated the children dependent as to Jose I.¹ The court made factual findings on the record and concluded, “the party moving forward, minors’ counsel, has satisfied the requisite burden of proof with respect to the dependency.” The court’s minute entry of that date similarly concluded sufficient evidence established the children were dependent, pursuant to § 8-201(13), the elements of which the court recited. This appeal followed.

¶5 “[B]ecause ‘[t]he primary consideration in a dependency case is always the best interest of the child, the juvenile court is vested with a great deal of discretion.’”

¹The children were adjudicated dependent as to Blanca on October 18, 2011, after she failed to appear at the hearing.

Willie G., 211 Ariz. 231, ¶ 21, 119 P.3d at 1038, quoting *Ariz. Dep't of Econ Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994) (internal punctuation omitted; first alteration added, second alteration in *Willie G.*). We will affirm an order adjudicating a child dependent unless the court has abused that discretion, *In re Pima Cnty. Juv. Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987), or the record does not contain reasonable evidence to support the factual findings upon which the court's order is based, *Willie G.*, 211 Ariz. 231, ¶ 21, 119 P.3d at 1038. And as we previously stated, we view the evidence in the light most favorable to sustaining the court's order. *Id.*

¶6 Section 8-201(13)(a)(i), the subsection relevant to this case, defines a dependent child as one “[i]n need of proper and effective parental care and control and who has no parent or guardian . . . willing to exercise or capable of exercising such care and control.” A preponderance of the evidence establishing these elements is required before a court can adjudicate the child dependent. *See* A.R.S. § 8-844(C)(1); Ariz. R. P. Juv. Ct. 55(C). On October 4, 2011, the first day of the dependency hearing, counsel for the children stated that three of the four allegations in the dependency petition had been resolved; it was undisputed that Jose I. and Blanca never had been married but Jose I. had established paternity and the lack of a custody order had been resolved by the court's entry of the order reached through mediation in July. But, counsel stated, the remaining issue was “whether or not the father is willing and able to protect his children from the mother going forward.”

¶7 At the end of the hearing in January 2012, the juvenile court stated it had considered all of the evidence that had been presented, “the credibility of the various witnesses, the acts of the mother,” which it found “very troublesome and threatening to the minors,” and Dr. Vega’s evaluation of Jose I. The court found the elements of § 8-201(13) had been established, adding that the parents “are either unwilling or unable to provide the necessary parenting and protection of the minors without further State supervision and intervention.” Thereafter, the court ordered ADES to “make reasonable efforts to arrange psychotherapy for the father, as recommended by Dr. Vega.” Addressing Jose I. directly, the court wished him luck and stated, “[Y]ou are doing a lot of the right things, but I am concerned about your kids and I want to make sure that you get all of the help that you can get to be a good dad to them 100 percent down the road.”

¶8 Contrary to Jose I.’s assertions on appeal, the record contains sufficient evidence to support the juvenile court’s ruling and establishes the court soundly exercised its discretion in adjudicating the children dependent. The record reflects the court’s primary concern was the children’s best interest and its comments demonstrate it considered all of the evidence before it. That evidence established Jose I. had been involved only marginally in his children’s lives before they were removed from Blanca’s custody and placed with him, and he did not seem to grasp fully the severity and dangerousness of Blanca’s conduct and its effect on the children. The evidence included Dr. Vega’s psychological evaluation and his testimony. Vega testified that when he met with Jose they had addressed the fact that Jose I. “had managed to father three children with two women . . . in kind of an irresponsible, thoughtless, almost impulsive, immature

fashion.” Jose I. agreed he had been irresponsible. The goal was for Jose I. “to adopt a different attitude and become more responsible.” Vega explained that Jose I.’s interest in Blanca had been sexual, and that he had impregnated her twice while more seriously committed to another woman with whom he had a child who was about the same age as Faith.

¶9 When asked whether Jose I. had discussed noticing anything about the children’s health, Dr. Vega responded, “Jose is very, very immature and he would make comments such as, you know, the kids, yeah, they did seem sick . . . but he didn’t take things real seriously and he didn’t really think beyond that.” Vega stated he believed Jose I. was “well intentioned” and probably helped his mother care for the children, adding, “but he certainly needs to understand his behavior and really understand that it takes more to be a father and it takes more in terms of really understanding the children’s needs.” In Vega’s view, Jose I. did not understand “the full impact of what Munchausen by proxy was all about here.” Vega did not believe at that time and without therapy, Jose I. could protect the children and set limits on Blanca. Finally, Vega did not believe Jose I. was ready to parent the children adequately, noting Jose I.’s mother had assumed the role as the primary parent.

¶10 Jose I. points to evidence that he claims demonstrated his willingness and ability to accept responsibility for the children. But that evidence was before the juvenile court when it ruled. The court’s comments at the end of the hearing reflect it was well aware of this favorable evidence and although it believed Jose I. was headed in the right direction, it nevertheless felt ADES assistance was necessary. We have no basis for

second-guessing that conclusion, which does not negate a finding that the children are dependent. The juvenile court is “in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004); *see also Pima Cnty. Juv. Action No. 93511*, 154 Ariz. at 546, 744 P.2d at 458 (as fact-finder, juvenile court in best position to weigh evidence and judge credibility of witnesses). This court will not reweigh the evidence, which is essentially what Jose I. is asking us to do. *See Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002).

¶11 Finally, we reject Jose I.’s summary assertion that the juvenile court violated his due process rights with respect to his fundamental right to parent his children because the court “pointed to no specific concerns he had with regard to Jose’s parenting or care of the children.” Quoting *In re Cochise County Juvenile Action No. 5666-J*, 133 Ariz. 157, 161, 650 P.2d 459, 463 (1982), he asserts, “There was no evidence to support the notion that Jose M. and Faith I.-M would be ‘seriously jeopardized’ in the care of their father without court involvement.” First, Jose I. did not ask the court to enter more specific findings either at the end of the dependency hearing, when it ruled from the bench, or after it issued its minute-entry order. He therefore has forfeited the right to assert as a ground for reversal that the factual findings the court made were not sufficiently specific. *See Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007).

¶12 Second, although parents’ rights to the care, custody and management of their children are fundamental, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), they “are

not absolute” because the government has a compelling interest in protecting children. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 24, 40, 110 P.3d 1013, 1018, 1021 (2005). The crux of the right to due process is the right to reasonable notice and an opportunity to be heard, which our dependency statutes and related procedural rules provide and Jose I. received here. See *J.D.S. v. Franks*, 182 Ariz. 81, 95, 893 P.2d 732, 746 (1995); *In re Maricopa Cnty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994). And based on the juvenile court’s comments at the end of the dependency hearing, together with the statutory elements for the adjudication, Jose I. was amply apprised of the bases for the court’s ruling. There was no due process violation here.

¶13 Given the evidence in the record before us, we must affirm the juvenile court’s order adjudicating Jose M. and Faith dependent as to their father, Jose I.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge